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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RUBEN GURROLA,

Defendant and Appellant.

G051605

(Super. Ct. No. 12NF0309)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Sheila F. Hanson, Judge. Affirmed.

Marcia R. Clark, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Christen Somerville, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Ruben Gurrola of implied malice murder based on a conscious disregard for the lives of others in driving the wrong way on a highway while heavily intoxicated (Pen. Code, § 187, subd. (a)); count 1), driving under the influence (DUI) causing great bodily injury (Veh. Code, §§ 23152, subd. (a); count 2), and driving with a blood alcohol level over 0.08 percent, causing bodily injury (Veh. Code, § 23153, subd. (b); count 3). The jury also found true the enhancement allegations that defendant caused bodily injury and death to more than one victim in one instance of driving (Veh. Code, § 23558) and that he personally inflicted great bodily injury (Pen. Code, §§ 12022.7, subd. (a); all further statutory references are to this code unless noted). The trial court sentenced defendant to 15 years to life for the murder conviction, with a concurrent term of six years for the DUI conviction and enhancement allegations on that count, and stayed under section 654 a similar six-year term on count 3 and its enhancements.

Defendant contends the trial court erred in failing to suppress statements he made in the hospital after the crash, on grounds the statements were involuntary because of his physical condition or that, for similar reasons, his waiver of rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) was not knowing and intelligent, or that he was not readvised of his rights in a later interview. He also argues the trial court erred in failing to accept his proposed additions to the jury instruction on implied malice. As we explain, none of these contentions require reversal, and we therefore affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

Around 1:45 a.m. on January 29, 2014, several drivers made 911 calls reporting a wrong way driver on the 241 toll road and then on the 91 freeway. The car, a black Honda Civic, was traveling around 60 or 65 miles per hour in the wrong direction, and drivers in the oncoming lanes honked, flashed their lights, and pulled to the side of the road to avoid a collision.

Young Kim and his passenger Sally Namgoong celebrated the Chinese New Year at the Pechanga Resort and Casino that night, and left for home on the 91 freeway before 1:00 a.m., heading west in the fast lane in a white Camry. As Kim rounded a corner approaching the 241 toll road, he saw headlights coming toward him, and then lost consciousness from the force of the collision with the black Civic. The impact spun both cars so that each came to rest facing the opposite direction they had been traveling. When Kim regained consciousness within a few minutes, he called 911 to report that he was injured and could not exit his vehicle and that Namgoong was passed out. Both of Kim's heels and ankles were shattered. Paramedics transported him to the hospital, where he underwent two surgeries on his left foot and one on his right. He remains permanently disabled and walks with a cane.

California Highway Patrol Officer Scott Woodward responded to the scene of the accident at 1:54 a.m. He contacted Kim, who stated the black Honda had been traveling the wrong direction when it struck him. Kim was concerned that Namgoong was hurt, and when Woodward called to her, she remained unresponsive. She was transported to the hospital and died later that morning from multiple traumatic blunt force injuries from the collision.

Woodward spoke to the passenger in the black Honda, Allison Poon, who explained defendant had been driving the car. She had blacked out from drinking and did not remember the accident. Her nose was broken in the accident and she later had surgery to repair it.

Woodward found defendant on the ground outside his vehicle. Defendant had crawled through the driver's side window to attempt to reach Poon and help those in the other vehicle, but he had injured his leg in the accident and he could not stand up. Woodward noticed defendant's leg was swollen and distorted in shape, which later proved to be a fractured femur.

Woodward smelled a strong odor of alcohol on defendant and also noticed his eyes were red and watery. Defendant's speech was also a little slowed and slurred. Defendant had left Newport Beach headed for San Diego, and believed he was in the area of the 91 and 73 freeways (which do not meet). He admitted he felt "pretty intoxicated" or "pretty buzzed" and that he had consumed at least nine alcoholic drinks, including Malibu Rum, vodka, and a few light beers between 9:00 p.m. and midnight. He had last eaten pretzels and chips around 7:00 p.m. He responded "no" when Woodward asked if his car had malfunctioned, whether he was on any mediation, or was sick or had impairments such as epilepsy. Defendant seemed to understand and was responsive in speaking to Woodward, and similarly was able to answer the paramedics as they prepared him for transport at the same time.

Defendant could not stand, so Woodward administered other field sobriety tests as he lay on a gurney and the paramedics attended him. Defendant failed the Romberg test and horizontal nystagmus sobriety tests. In the former, defendant estimated as 76 seconds an actual elapsed time of 30 seconds, a "significant" failure. Woodward also observed nystagmus in both defendant's eyes as he moved them horizontally. Defendant's Preliminary Alcohol Screening breath tests registered his blood alcohol concentration (BAC) at 0.151 percent at 2:16 a.m. and 0.147 percent at 2:20 a.m. Woodward then rode in the ambulance with defendant to the UCI Medical Center, where he read defendant his *Miranda* rights, obtained his waiver, and questioned him about the accident, as we discuss more fully below.

At trial, Erin Nixt, a forensic alcohol scientist with the Orange County Crime Lab, testified concerning defendant's blood draw at 3:16 a.m., which showed a blood alcohol concentration of 0.17 percent. She explained that based on standard absorption and dissipation rates, if a male subject stopped drinking between midnight and 12:30 a.m., a 0.17 BAC at 3:16 a.m. would indicate a BAC of 0.185 to 0.195 percent at 1:50 a.m., and a peak level of intoxication slightly earlier at 1:30 a.m. For a male

weighing 160 pounds, the 0.17 percent BAC would correspond to consuming between eight and nine and one-half standard alcoholic drinks.

Nixt explained that a BAC of 0.08 percent results in impairment in every human subject and that, even at a level of 0.07 percent, a person could have a more difficult time perceiving danger and experience a lowering of inhibitions causing them to disregard danger. She explained that people with a high alcohol tolerance will show less impairment, and that a person who has consumed several drinks but still appears to be able to walk and function normally likely has a high tolerance. Based on a hypothetical mirroring the facts of the case, Nixt opined that a person in those circumstances would be an impaired driver.

A drug awareness safety instructor, Gay Geiser Sandoval, testified he taught a class defendant attended in high school in 2007. The class included extensive instruction on the dangers of driving under the influence of alcohol.

II

DISCUSSION

A. *Miranda*

Defendant contends the trial court erred in finding his "second, third and fourth statements to the police were admissible." Defendant challenges the admissibility of the second and third interviews, which took place at UCI Medical Center, on grounds his "substantially weakened" and "vulnerable" condition in the hospital soon after the crash rendered his *Miranda* waiver and ensuing statements involuntary. He claims the fourth interview at Kaiser hospital two and one-half days later was inadmissible because the officer did not readvise him of his *Miranda* rights. Officer Woodward conducted all three interviews, which followed his first brief interview with defendant at the crash scene. As we explain, defendant's challenges furnish no basis for reversal.

1. Second and Third Interviews

Defendant argues the evidence required the trial court to find his statements at the UCI Medical Center, including a videotaped third interview, were not voluntary or knowing and intelligent under *Miranda* based on his physical condition, including lingering intoxication, pain from a broken femur and sternum, a possible head injury, possible shock symptoms, and possible effects of Fentanyl, a narcotic pain medication.

"In reviewing the trial court's denial of a suppression motion on *Miranda* and involuntariness grounds, '"'we accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. We independently determine from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained.'"' [Citation.]" (*People v. Duff* (2014) 58 Cal.4th 527, 551.)

We first briefly review defendant's challenged statements and the trial court's findings. Woodward rode in the ambulance with defendant to the UCI Medical Center, in part to monitor whether the paramedics administered any medication that would affect defendant's ability to answer questions. Woodward did not question defendant along the way, but soon after they arrived at the emergency department around 2:30 a.m., he told defendant he was under arrest and advised him of his *Miranda* rights. Defendant answered "yes" when Woodward asked him if he understood his rights, and answered "yes" again when asked, "Having these rights in mind, do you wish to talk with [me]?" Woodward testified that, similar to his first brief contact with defendant at the crash scene (first interview), nothing suggested defendant had any difficulty understanding him at the hospital (second and third interviews), nor did defendant have any questions about his rights.

The hospital interviews were very brief. After expressly waiving his *Miranda* rights, defendant spoke to Woodward for five, "maybe ten minutes at the most," according to Woodward. Defendant admitted he knew it was dangerous to drink and

drive, that he had seen the movie "Red Asphalt" warning of the dangers of drinking and driving, and that he had "taken classes when he got his license originally," similarly warning "it was unsafe to drive — drink and drive." Woodward asked defendant specifically if he knew someone could "get hurt and possibly die as a result of him drinking and driving," and defendant answered affirmatively. Defendant explained he also knew of the danger from watching and reading the news about people hurt or killed during DUI crashes. This interview ceased when another officer arrived with a video camera to record the ensuing third interview, which followed immediately and lasted another nine or 10 minutes.

During the third interview, defendant confirmed as he had in the first interview at the crash scene the number of drinks he had (nine), which he consumed after 8 p.m. that night, and he confirmed as he had stated in his second interview that he was aware of the dangers of drinking and driving. When Woodward asked, "Are you taking any medicine or drugs," defendant shook his head no. He admitted he had driven after drinking in the past, but claimed it was "[j]ust probably once." He also admitted it had crossed his mind not to drive that evening, but he "thought I'd be ok" and claimed he was not feeling the effects of alcohol when he started driving, or was only "a little buzzed," but just became "tired and sleepy and then I don't remember." He never realized he was driving the wrong way.

Defendant asked if Poon was okay, which Woodward confirmed. He also asked if anyone had died, and when Woodward answered, "One other person," defendant gave a long exhale before stating, "Stupid of me. Stupid." At the close of the interview, defendant correctly recited his address, birth date, and other information before adding, "I'm going away for a long time. It was stupid."

The trial court concluded defendant "voluntarily provide[d] [his] answers" in the hospital interviews, observing he "appeared to understand the questions that were asked," and that the "tone between the officer and [defendant] was very casual."

Defendant did not testify, but the court heard Woodward's testimony and viewed the videotaped recording of the third interview. The court determined defendant spoke with Woodward "not because he was being coerced . . . and not because in any way he didn't understand what was happening," but because "he was trying to be cooperative." Woodward similarly noted defendant's cooperation in each interview.

The trial court recognized defendant "had a serious break of his femur," but added, "there's nothing to indicate to the court he was so overcome by pain that he wasn't responding voluntarily." The court could not exclude the possibility defendant had received pain medication at some point before the interview ("I don't know if that's the case"), but noted in any event that defendant was "responsive" and his answers were "on point." The court concluded: "He's in a hospital bed. He's in a neck brace. But there's nothing about his conduct [to suggest] that he was in excruciating pain. He was in no way trying to end the conversation or have the officer stop asking questions. He appeared to be incredibly cooperative, and he appeared to answer the questions that were asked," not because he was coerced or incapacitated, "but because he was voluntarily providing those answers[.]" Consequently, the trial court denied defendant's motion to suppress his statements at the UCI Medical Center.

Governing law supports the trial court's conclusion. Due process requires that a suspect's admissions must be the product of a rational intellect and free will, voluntarily made. (*Dickerson v. United States* (2000) 530 U.S. 428, 434.) The reviewing court must determine under the totality of the circumstances whether the defendant's will was overborne in giving a confession. (*Ibid.*) In certain circumstances, a drug-induced statement may not be the product of free will. (*Townsend v. Sain* (1963) 372 U.S. 293, 307 (*Townsend*), overruled on other grounds in *Keeney v. Tamayo-Reyes* (1992) 504 U.S. 1; see also *In re Cameron* (1968) 68 Cal.2d 487, 498 (*Cameron*) ["issue is whether the accused's abilities to reason or comprehend or resist were in fact so disabled that he was incapable of free or rational choice"].) In *Townsend*, for example, the high court

concluded the defendant's confession was involuntary after he ingested a drug said to have "truth serum" properties. (*Townsend*, at p. 308.) The court found it "difficult to imagine a situation in which a confession would be less the product of a free intellect, less voluntary, than when brought about by" such a drug. (*Id.* at pp. 307-308.)

Similarly, the totality of the circumstances in *Mincey v. Arizona* (1978) 437 U.S. 385 (*Mincey*) required suppression of the defendant's statements after he was transported to a hospital. The defendant "had been seriously wounded just a few hours earlier, and had arrived at the hospital 'depressed almost to the point of coma,' according to his attending physician. Although he had received some treatment, his condition at the time of [the] interrogation was still sufficiently serious that he was in the intensive care unit. He complained to [the officer] that the pain in his leg was 'unbearable.' He was evidently confused and unable to think clearly about either the events of that afternoon or the circumstances of his interrogation, since some of his written answers were on their face not entirely coherent." (*Id.* at pp. 398-399.) The court described the defendant's condition as "debilitated and helpless," and noted he lost consciousness during the interrogation, which resumed when the defendant awoke. (*Id.* at pp. 399, 401.) The interrogating officer ignored the defendant's numerous requests for an attorney, and the nurse suggested the defendant should answer the questions. (*Id.* at p. 399.) The Supreme Court reversed the conviction because the defendant's admissions were not "'the product of his free and rational choice.'" (*Id.* at p. 401.)

Voluntariness similarly plays a role in whether a defendant's *Miranda* waiver is valid. In *Moran v. Burbine* (1986) 475 U.S. 412, the high court explained that whether a valid waiver has been established has two distinct dimensions: "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality

of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." (*Moran*, at p. 421.)

Here, the trial court reasonably could conclude, and we similarly conclude, that the record reflects defendant's statements were voluntary and that his *Miranda* waiver was knowing, intelligent, and not coerced. Defendant was not "debilitated and helpless" like the defendant in *Mincey*; he was not in a coma-like state, nor did he complain of "unbearable" pain in his leg, nor did he provide incoherent statements or pass out mid-interview only to be reinterrogated upon regaining consciousness. (*Mincey*, *supra*, 437 U.S. at pp. 398-401.) To the contrary, as the trial court found and as reflected in his videotaped interview, defendant's engagement in the interview was "on point," his answers were "responsive," and he "appeared to understand the questions that were asked."

Defendant suggests his answers were only responsive in a mechanical fashion because he now complains Woodward's questions were "leading," but the record does not support this claim. Woodward asked some open-ended questions and others probed whether defendant's answers remained the same from his first and second interviews. As the trial court noted, defendant's answers were "consistent" across all his interviews, and therefore what defendant labels as "leading" questions were proper in giving defendant the opportunity to affirm or deny or further explain his earlier answers.

In some cases, defendant added detail to those answers or made slight attempts to minimize his guilt. For example, he suggested he was only "a little buzzed" but "thought I'd be ok" to drive, which indicated he understood the nature of the interviews and the importance of his answers. Indeed, he had been arrested and advised of his *Miranda* rights, which he expressly acknowledged, but nevertheless admitted the "stupid[ity]" of his actions and that he likely was "going away for a long time." These admissions reflected an accurate appraisal of the gravity of his actions and his present

circumstances, differing markedly from the incoherent and involuntary statements in *Mincey*.

Defendant's reliance on *Townsend* and *Cameron* is similarly unavailing. The record is unclear whether defendant received Fentanyl as a pain medication before or after his interviews. Woodward did not believe defendant received any medication in the ambulance. The hospital records suggest the Fentanyl was administered between 4:00 a.m. and 5:00 a.m., and not upon defendant's arrival in the emergency room, but Woodward acknowledged the third interview may have begun recording as late as 3:50 a.m., so the trial court could not rule out some overlap. In any event, however, defendant points to no testimony regarding Fentanyl's effects, let alone that it had anything like the truth serum properties in *Townsend* that could overbear a person's will. And the record here is nothing like the facts in *Cameron*, where the Thorazine dose administered there plainly counteracted the defendant's initial attempts to resist questioning and deflect guilt. (*Cameron*, *supra*, 68 Cal.2d at p. 498.) Here, defendant's consistently cooperative conduct and responsive engagement in questioning amply supported the trial court's conclusion his statements were voluntary.

Defendant's suggestion he may have had a head injury or may have been suffering from shock do not undermine this conclusion. The record does not support defendant's claim these or any other possible injuries may have prevented defendant from giving a voluntary statement. Woodward testified he was aware a concussion or head injury could affect a person's ability to accurately answer questions, and he asked defendant at the scene whether he suffered a head injury. The airbags had deployed in the accident, but defendant thought he might have bumped his head on the steering wheel. He did not, however, complain of any "problems or pain" in his head and, as in his later interviews, he was coherent, appeared to understand Woodward's questions, and gave complete and responsive answers.

Similarly, while defendant at the suppression hearing elicited from the emergency room physician that high blood pressure and an "increased heartbeat" can be "attributable to shock," and that defendant had those symptoms at the time he was admitted, the physician explained they do not necessarily show the patient is in shock, but may arise from "other things." It does not appear any of the hospital records suggested defendant was in shock and, as the physician observed, his treatment focused on defendant's "most significant" medical issue: his broken femur. Defendant did not complain to the hospital staff of a head injury. Based on the totality of the circumstances, the trial court reasonably could conclude from the evidence in the record that defendant's statements were voluntary, and we agree.

The record similarly shows defendant validly waived his *Miranda* rights. Defendant was 23 years old and a senior studying manufacturing and engineering at Cal Poly Pomona. Under ordinary circumstances, there is no question he could comprehend and validly waive his rights. As discussed, the record does not suggest he was so incapacitated by drugs or alcohol or his injuries that he could not voluntarily or knowingly and intelligently waive his rights. A suspect who has ingested drugs or alcohol may provide a valid waiver if he understands his rights. (*People v. Breaux* (1991) 1 Cal.4th 281, 301.)

Defendant's peak alcohol level had passed at least 90 minutes or more before Woodward interviewed him at the hospital and, while his BAC at the time of the accident impaired him for purposes of driving, there was no testimony it prevented him from comprehending his *Miranda* rights. Defendant understood Woodward and the paramedics at the accident scene, responding appropriately to their questions, and the same is true at the hospital.

Defendant affirmatively indicated he understood his rights when Woodward read them to him, and the record does not undermine this conclusion, particularly where defendant expressly waived those rights to speak with Woodward. His

interactions with Woodward were "on point," he was "responsive" in answering questions, and the trial court found defendant understood the questions and his *Miranda* rights, and voluntarily, knowingly, and intelligently waived them. There was no evidence of coercive police conduct, and therefore no evidence he involuntarily spoke with Woodward when he waived his *Miranda* rights. (*Colorado v. Connelly* (1986) 479 U.S. 157, 167.) The evidence supports the trial court's decision not to suppress defendant's statements at the UCI Medical Center, and we agree that decision was correct under the law.

2. Fourth Interview

Defendant argues the trial court erred in failing to suppress his fourth interview with Woodward, which took place two and one-half days following the accident, after defendant had been moved to a different hospital (Kaiser). Defendant contends Woodward was required to fully and completely readvise him of his *Miranda* rights because the fourth interview occurred about 60 hours after Woodward first read defendant his rights at the UCI Medical Center.

Readvising a defendant of his *Miranda* rights "is unnecessary where the subsequent interrogation is 'reasonably contemporaneous' with the prior knowing and intelligent waiver. [Citations.]" (*People v. Mickle* (1991) 54 Cal.3d 140, 170 (*Mickle*),) As *Mickle* explained, "The courts examine the totality of the circumstances, including the amount of time that has passed since the waiver, any change in the identity of the interrogator or the location of the interview, any official reminder of the prior advisement, the suspect's sophistication or past experience with law enforcement, and any indicia that he subjectively understands and waives his rights."

In *Mickle*, the Supreme Court determined readvisement was unnecessary before a hospital interview occurring 36 hours after the defendant had received and waived his *Miranda* rights. The court explained: "It was clear from the circumstances

that defendant was still in official custody. He was familiar with the criminal justice system and could reasonably be expected to know that any statements made at this time might be used against him in the investigation and any subsequent trial. Indeed, the hospital interview was conducted by the same two officers who had interrogated defendant and placed him under arrest at the police station. By asking whether he 'remembered' them and the prior 'conversation,' the officers implied that they were simply tying up loose ends from the earlier [interrogation]." (*Mickle*, *supra*, 54 Cal.3d at p. 171; see *People v. Williams* (2010) 49 Cal.4th 405, 435 [40-hour gap did not require readvisement]; *Biddy v. Diamond* (5th Cir. 1975) 516 F.2d 118, 122 [readvisement unnecessary more than a week later].)

The trial court acknowledged Woodward did not reread defendant his *Miranda* rights "in full" before the fourth interview. But his readvisement was almost complete, and no particular "talismanic incantation [i]s required." (*California v. Prysock* (1981) 453 U.S. 355, 359.) Woodward called for defendant to remember the initial advisement, reminding him, "I read you your rights, you had the right to remain silent, you had the right to an attorney," and when Woodward added, I hear you got an attorney[,] right," defendant answered "Yeah." Woodward then returned to reminding defendant of his rights, stating, "[Y]ou don't have to talk to us if you don't want to[.] It's up to you. At that point, you agreed to talk to me, answer any questions I had. And if there's any questions that you don't want to answer, you don't have to answer them. So, I was going to ask you a few more questions if that's okay? Just as far as what taxi you took [back to his car from the bar, before leaving Newport Beach] and that kind of stuff." Defendant then proceeded to answer Woodward's questions, impliedly waiving his rights.

Under the totality of the circumstances, we conclude Woodward's failure to fully readvise defendant of his rights does not constitute a *Miranda* violation requiring suppression of the fourth interview. Woodward did not remind defendant that if he could

not afford an attorney, one would be provided for him, but here that is an immaterial omission because defendant confirmed he had retained an attorney. Woodward expressly reminded defendant of all his other rights, except that he did not reiterate that anything defendant said could be used against him. (See *Miranda*, *supra*, 384 U.S. at pp. 473-474 [listing rights].) In *Mickle*, however, the officers did not expressly remind the defendant of *any* of his rights, even though the location of his interview changed and a day and a half had passed. There, the defendant's familiarity with the criminal justice system was sufficient for the court to conclude he was aware of his rights, including the right to silence to avoid self-incrimination. (*Mickle*, *supra*, 54 Cal.3d at p. 171.)

Here, defendant had no similar criminal history to draw on, but Woodward's thrice-stated reminders of defendant's right to silence provided defendant with the necessary information to recall his earlier *Miranda* warnings. In particular, Woodward reminded defendant at the beginning of the fourth interview of his "right to remain silent," "you don't have to talk to us if you don't want to," and "if there [are] any questions that you don't want to answer, you don't have to answer them." Defendant's earlier *express* acknowledgment of each of his rights and *express* waiver are also important. As the high court observed in *Davis v. United States* (1994) 512 U.S. 452, 460, *Miranda* warnings themselves, when validly waived and apart from familiarity with the criminal justice system or any other factor, are "'sufficient to dispel whatever coercion is inherent in the interrogation process.'" The earlier waiver, which we have concluded was voluntary, knowing, and intelligent, therefore has some bearing on whether defendant still subjectively understood his rights at the time of the fourth interview.

True, 60 hours had elapsed. But unlike in *Mickle* where the setting changed from the police station to a hospital, and yet the initial advisement was still effective, here defendant remained in a hospital room. While he had changed hospitals, he remained in a restricted setting, free at least of the distractions that would accompany a patient's

release and return to everyday life, which could erode the initial advisement's efficacy. Defendant had surgery on his leg in the intervening 60 hours, but nothing in the record suggested any complications in his treatment or recovery. Instead, he had ample time to reflect on the accident, his advisement and discussions with Woodward, and whether he regretted speaking with him. To the contrary, it plainly appeared in the fourth interview that defendant remained committed to cooperating with Woodward, who noted at the end of the interview that defendant had been "so . . . cooperative, you're cooperative right now, you were cooperative on scene, I appreciate that."

Defendant argues that his initial greeting when Officer Woodward contacted him in his room for the fourth interview ("Are you the one on the scene?") illustrates his lack of memory generally and, in particular, that he did not remember his initial advisement, so readvisement was necessary. When Woodward confirmed he was the responding officer, defendant answered, "Ok. I don't even remember."

But defendant immediately explained that when he "got to UCI . . . they took off my contacts," trailing off, "so I don't . . . ," and when Woodward interjected, "Oh, they did," defendant then added, "Yea, so I . . . (inaudible) . . . remember much of anything else but (inaudible)." In this context, we are confident defendant meant he did not remember *seeing* much of anything once his contacts were removed. Indeed, it appears defendant seemed at least familiar enough with Woodward to ask whether he was the officer at the scene. He never stated during the course of the interview that he did not remember the earlier advisement or interviews, even when Woodward probed him on his earlier statements (e.g., "originally ah you told me you were going to San Diego").

In sum, based primarily on Woodward's "official reminder of the prior advisement" (*Mickle*, *supra*, 54 Cal.3d at p. 170), which itself was nearly a complete advisement, and based on defendant's established subjective understanding of his rights in his earlier interview and the continuity of the hospital

setting and Woodward's role as the interrogator (see *ibid.*), we conclude Woodward did not violate defendant's *Miranda* rights in conducting the fourth interview.

Even assuming defendant's fourth interview was erroneously admitted, any error would be harmless beyond a reasonable doubt. (*People v. Sims* (1993) 5 Cal.4th 405, 447, citing Chapman v. California (1967) 386 U.S. 18.) The only potential prejudice defendant notes as to admission of the fourth interview is that he repeatedly "describe[d] how he'd been schooled in the dangers of drinking and driving" and that "he had ordered drinks with the maximum amount of alcohol (Long Island Ice Teas)." But defendant's admission he knew of the dangers of drinking and driving from the movie "Red Asphalt" and an anti-drunk driving class duplicated earlier admissions; indeed, his earlier statements were more extensive on the topic. His statement about ordering drinks with "plenty of alcohol for the price" was new, but it was not prejudicial because the record already showed defendant consumed a great deal of alcohol; in fact, his estimate of nine drinks corresponded with the forensic alcohol examiner's calculation of the number of drinks in his system. Consequently, any error in admitting the fourth interview was harmless and does not require reversal of the judgment..

B. *CALCRIM No. 520*

Defendant contends the trial court erred in rejecting his requests to modify the Judicial Council's model instruction on implied malice, CALCRIM No. 520. Specifically, he asked that the trial court add the word "subjectively" to the third component of CALCRIM No. 520's definition of implied malice to clarify the jury must find he subjectively rather than objectively knew his act was dangerous to human life. He also requested that the court add language to CALCRIM No. 520 to define "conscious disregard" as "I know my conduct is dangerous to others, but I don't care if someone is

hurt or killed." We independently review claims of instructional error. (*People v. Waidla* (2000) 22 Cal.4th 690, 733, 737.) There was no error here.

After declining defendant's requests, the trial court instructed the jury on implied malice as follows, using CALCRIM No. 520, which states in pertinent part: "There are two kinds of malice aforethought: express malice and implied malice[.] . . . The defendant acted with implied malice if: [¶] 1. He intentionally committed an act; [¶] 2. The natural and probable consequences of the act were dangerous to human life; [¶] 3. At the time he acted, he knew his act was dangerous to human life; and [¶] 4. He deliberately acted with conscious disregard for human life."

The Supreme Court has upheld CALCRIM No. 520 as an accurate statement of the law of implied malice. (*People v. Knoller* (2007) 41 Cal.4th 139, 143, 152.) There, the court explained: "Malice is implied when the killing is proximately caused by '"an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life."' [Citation.] In short, implied malice requires a defendant's awareness of engaging in conduct that endangers the life of another . . . ." (*Ibid.*)

The trial court properly refused both of defendant's requests to restate already plain language in CALCRIM No. 520. While he claims inserting the word "subjectively" would clarify that the standard for knowledge of the risk of dangerousness was subjective rather than objective, the simple words "*he* knew" adequately conveyed the requirement of subjective knowledge. Inserting "subjectively" would be redundant, and the court properly may refuse adding repetitious instructions. (*People v. Wright* (1988) 45 Cal.3d 1126, 1134.)

Similarly, defendant's attempt to add a definition of "conscious disregard" in "everyday language" was redundant because the words "conscious" and "disregard" each have plain meaning in everyday use, and putting them together does not add any

complexity requiring a separate definition. Specifically, defendant sought to modify CALCRIM No. 520 by adding the following further explanation: "Phrased in everyday language, the state of mind of a person who acts with conscious disregard for life is 'I know my conduct is dangerous to others, but I don't care if someone is hurt or killed.'" The court in *People v. Olivas* (1985) 172 Cal.App.3d 984, 988, used the quoted language to restate implied malice in colloquial terms.

But CALCRIM No. 520 properly uses the Supreme Court's definition of implied malice, and no further definition or restatement was required. "When a jury is properly instructed as to an applicable legal principle it is unnecessary to restate that principle in another way." (*People v. Schmitt* (1957) 155 Cal.App.2d 87, 112.) Simply put, a trial court does not err in refusing a duplicative proposed instruction, even though the instruction may be a correct statement of law. (*People v. Moon* (2005) 37 Cal.4th 1, 30.)

III

DISPOSITION

The judgment is affirmed.

ARONSON, ACTING P.J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.